

Episode 46

Appointment in Federal Shariat Court

While I had done an LLB, and passed with flying colours, I had never even imagined working in a court, as I have mentioned previously. Thus, prior to now, I had only once been to a court when I was sought in Karachi's High Court as an advisor to the court regarding some Fiqhi issue. However, I did not address the court even at that time as the case was deferred. I had accepted my appointment in the Federal Shariat Court because its main task was to analyze laws in the light of the Quran and Sunnah and to annul non-Shariah-compliant laws. This followed from the recent amendment to the Constitution of the country which accorded every citizen of Pakistan a right to challenge any law of the country which they considered to be contrary to the Quran and Sunnah, and to present their arguments before this Court. Thereafter if this Court concurred with this position, they could declare that particular law to be null and void from a set date. This was the most important responsibility of the Federal Shariat Court. However, with respect to verdicts of criminal cases issued by lower courts under the Hudood Ordinance, hearing appeals against such verdicts was also among the responsibilities of the Federal Shariat Court.

At that time, the Federal Shariat Court comprised of seven members. Its chairman was Justice Aftab Husain, while Justice Zahoorul Haq, Justice Chaudhary Muhammad Siddiq and Justice Kareemullah Durrani had been selected from High Courts. And three members were scholars, whose names I have mentioned above. At that time, judges of the Federal Shariat Court were called Members and the head judge was called Chairman. Later, the members were called Judges and the head judge was called Chief Justice.

My reluctance in accepting this position was based on personal difficulties, but in principle I considered the establishment of this Federal Shariat Court, despite its shortcomings, as a positive step towards the implementation of Islamic laws. Those individuals who did not fully comprehend contemporary laws objected to my accepting this position, and some of them even openly expressed this, rather some individuals, who have now departed from this world, even

accused this lowly one of making a fundamental error in judgment owing to this lowly one's desire to acquire a high position and a good salary.

There were three main reasons for their objections. Firstly, this Court comprised of more common judges than scholars, and if the scholars and other judges differed upon any matter, the opinion of the other judges would prevail. This was indeed true, but though this Court had only three scholars compared to four judges coming from High Courts, I believed that gaining concurrence from at least one of those judges would not be too difficult, and in this way an effective channel for changing un-Islamic laws would be created. Later, this presumption of mine proved to be correct.

A second objection was that verdicts issued by the Federal Shariat Court could be challenged in the Supreme Court, and the ultimate verdict lay in the hands of the Supreme Court. People were under the impression that the Supreme Court could cite secular laws when changing the verdicts issued by the Federal Shariat Court. This was a misconception, because for appeals against the verdicts issued by the Federal Shariat Court, there was a separate Shariah Appellate Bench in the Supreme Court which heard those appeals. This Bench could not change the verdicts issued by the Federal Shariat Court based on secular laws, rather it was also bound to listen to the arguments in the light of the Quran and Sunnah, and if it reached the conclusion that the Federal Shariat Court had erred in its interpretation of the Quran and Sunnah, only then could it rule against those verdicts. Though there were no scholars in that Bench at that time, the late President had promised to appoint scholars in it.

A third objection raised by religious circles against the Federal Shariat Court was that four kinds of laws were out of its scope of action. Firstly, the Constitution. Secondly, laws relating to court procedures. Thirdly, Muslim Personal Law. And fourthly, fiscal laws, which remained out of its scope for a long duration. Those individuals who did not possess sufficient knowledge of contemporary laws and court proceedings assumed that with these four kinds of laws being declared out of its scope, there were no other laws which this Court could change. Especially due to the Muslim Personal Law being declared out of its scope, the common impression was that contemporary family laws could also not be changed. It is true that these exceptions to the

Federal Shariat Court's scope of action were a weakness in it, but firstly, I believed that several un-Islamic laws could still be changed even with these exceptions in place, and thus, this was the first good opportunity to work in this direction, which was a positive step and much benefit could be acquired through it. Secondly, in my view these exceptions were of a temporary kind, and if this Court were used correctly, these exceptions could be gradually removed. Additionally, I was also aware that in light of the Constitution, higher courts could specify their own scope of authority, and some of these exceptions were such that the Court itself could interpret them and define logical boundaries for its scope of authority. For example, I believed that the exception of "Muslim Personal Law" did not necessarily mean the exception of family laws, and that this topic could be raised for discussion at some point. Secondly, fiscal laws were anyway excepted for a limited time, after which they would automatically come under the Court's scope. Furthermore, the Court could itself define which fiscal laws were out of its scope. And as I will describe ahead InshaAllah, in practice my assumption proved to be largely correct. Thus, I considered it a serious mistake to consider this Court useless. A major harm that this misconception caused is that religious circles did not try to benefit from this Court, and due to their lack of interest, its benefits were much less than its potential, to the extent that it has now regressed into an almost defunct institution, details of which I will mention ahead InshaAllah.

Anyway! I was by no means under any misconception that this Court was useless. I thus accepted my appointment as a member of this Court at my elders' instructions despite my personal difficulties.

Since this was vacation time in Darul Uloom, I moved to Islamabad with my family with an intention to stay there for two to two-and-a-half months. Our accommodation was arranged in a two-room suite in the Government Hostel. At that time, the Federal Shariat Court was temporarily located in a bungalow. When court proceedings began, some appeals against the Hudood Ordinance came for hearing. Files of those cases would be sent to the judges beforehand. I diligently studied them until late night. The process for issuing verdicts was like this: when the hearing was completed, the head judge would send files of the cases to various judges for them to write their verdicts. After hearings of the very first day, Justice Aftab Husain sent files of

a case to me to write my verdict, and I wrote the verdict of the case in Urdu on the first day itself. And this was perhaps the first verdict written in Urdu language in higher courts. Afterwards, other judges, such as Justice Kareemullah Durrani, Justice Zahoorul Haq and Justice Aftab Husain also wrote many verdicts in Urdu.

It was perhaps my second or third day in court when a case came for hearing in which a husband had accused his wife of Zina (adultery) and the lower court had handed the wife a *Ta'zeer* punishment for the crime of Zina. When appeal of this case came for hearing, the respected judges were in favour of sustaining the verdict issued by the lower court. I told them: "When a husband accuses his wife of Zina, the Shariah grants her a right to demand for *Li'aan*. We should thus grant this right to the wife." At this, Justice Aftab said: "This is the job of a family court. A criminal court cannot do this job." Since I was directly involved in drafting the Hudood Ordinance, I stated: "The method of *Li'aan* is stated in the Hudood Ordinance itself." However, the other judges were not aware of this and proceedings of *Li'aan* had never before taken place in any criminal court. According to those judges, this proceeding was completely foreign to criminal courts, so they did not pay much attention to this and rejected the appeal based on majority opinion. The verdict of this case was written by the late Justice Aftab, who was the Chairman of the Court at that time. When his verdict came to me for my signature, I wrote a note of contention to it in which I referred to the relevant articles of Qazf Ordinance and wrote: "The woman should have been offered *Li'aan* in this case, and if she so demanded, the court should have conducted the proceedings of *Li'aan* between the husband and wife." The next day, after this note reached Justice Aftab, he said in a complaining tone: "You did not have to write a note of contention for such a small matter." While we were in the midst of this conversation, the late Justice Kareemullah Durrani entered the room and said to Justice Aftab: "Today I have realized the benefit of including these scholars in the Court. What Maulana said was absolutely correct." Thereafter he showed the relevant articles of Qazf Ordinance to Justice Aftab and said: "The process of *Li'aan* has been clearly stated, and we can also conduct this proceeding in our capacity as a criminal court." Consequently, the Court conducted these proceedings in several future cases at my request.

As I have mentioned before, my main interest was not in criminal cases, rather in those appeals in which contemporary laws were challenged as being contrary to the Quran and Sunnah. The court procedure stated that for such petitions, neither a lawyer was required nor any fees were charged nor any stamp paper needed. Any common citizen could write his petition on a plain piece of paper and present it. Regrettably, due to the above-mentioned misconceptions as well as not realizing the importance of this work, no such petitions were filed by religious circles. I reminded people in several gatherings, especially scholars, to take advantage of this opportunity. I stated that despite the limitations to its scope of authority, there were still hundreds of laws which were within the scope of the Court. These talks of mine were also published in bold headlines in newspapers, but religious circles did not pay attention. However, those people who disliked some laws due to personal interests would file petitions against them.

As I have mentioned, this was vacation time in Darul Uloom, so I had moved here with the intention of staying for two to two-and-a-half months. I thought I would request President Zia-Ul-Haq to appoint someone else in my place and thereafter return back to Karachi. Accordingly, the month of Sha'ban was spent in Islamabad. Besides a private secretary, I had also been provided with a Toyota car, a chauffeur and a chef from the Court. The salary was also good for those times. Despite all these conveniences, I was not settling well here. My two children were small, and all of us were used to living in a house bustling with family members and were accustomed to the hustle and bustle of Karachi. On the contrary, we were not accustomed to the quiet atmosphere in Islamabad. To keep the children happy, I would take them out to the tourist spots in Islamabad such as Shakarparian, Daman-e-Koh, Rawal Dam, etc. in the evening, and to Murree on weekends. But for how long? At the same time, I was anxiously waiting for an opportunity to meet President Zia-Ul-Haq and inform him of my intention. In the meantime, Ramadan arrived, and this was my first time spending Ramadan outside Karachi.

There is a peculiar pleasure in spending the blessed month of Ramadan in Karachi, as a special aura of Ramadan seems to engulf the entire city. In comparison, Ramadan in Islamabad felt rather bland. Taraweeh prayer would be conducted in the mosque of the Government Hostel, but the Imam would recite in such a *Qira'ah* (recitation) as I had never heard before. I would thus visit

Islamabad's central Jami' mosque (Lal Masjid), where Hadhrat Maulana Abdullah (may Allah's mercy be upon him) would lead Taraweeh prayers. May Allah Most High raise him to the highest stations of Paradise, for he never left any stone unturned in fulfilling the rights of love towards this lowly one.

At long last, I had a meeting with the late President Zia-Ul-Haq during Ramadan itself, and I informed him: "I cannot leave Darul Uloom. I am therefore unable to stay in Islamabad permanently. You can appoint Maulana Abdul Quddoos Qasimi in my place". Maulana was a very competent elder and was a graduate of Darul Uloom Deoband. At that time, he was the Head of the Faculty of Arabic Studies in Peshawar University, and was also familiar with the English language. After listening to my words, the respected President said: "I intend to transfer you from the Federal Shariat Court to the Shariah Appellate Bench of the Supreme Court, as two scholars need to be appointed there as well. Your wish of not leaving Darul Uloom would be fulfilled there, as the Shariah Appellate Bench of the Supreme Court does not hold court on a daily basis, rather the sessions occur for a week or two every month or other month. You can remain in Darul Uloom and continue your work when the Court is not in session, and you would not have to permanently settle in Islamabad. I also intend to do the same for Pir Muhammad Karam Shah. Thereafter I shall appoint your recommended scholars to your current positions." I had no reluctance in proceeding with this proposal so I expressed my agreement. At the same time, I stated: "It would be good if this can be done by the middle of Shawwal so that I can resume work in Darul Uloom." The respected President replied: "InshaAllah efforts shall be made to do this." I was thus quite content regarding this matter. Meanwhile, Ramadan came to an end and I celebrated Eid in Lahore. The middle of Shawwal arrived but there was still no news regarding the matter of the Supreme Court. I met the respected President again. He said: "This matter is getting delayed due to some reasons. If you wish, you can take leave for a month or more from the Court and visit Karachi. I thus took a one-month unpaid leave from the Court and came to Karachi. However, the matter regarding the Bench of the Supreme Court continued to be delayed and my leave ended. I thus returned to Islamabad for some time, and after some time, again took unpaid leave and came to Karachi. I do not correctly remember how many times these to-and-fro visits to Karachi took place, but they resulted in me not being able to do much work in the Federal Shariat Court.

At long last, I received the appointment to the Shariah Appellate Bench of the Supreme Court. Of the verdicts that I had issued until this time, there were very few which I agreed to be published in the PLD. Among those, two or three were related to criminal laws and one elaborate verdict was related to the punishment of "*Rajm*" (stoning).

Regarding the verdict that the Federal Shariat Court had issued to annul the law of *Rajm*, the government had already filed an appeal in the Shariah Appellate Bench even before this lowly one's appointment. During the hearing of this appeal, several scholars, lawyers and thinkers from both sides were invited to present their arguments. This hearing continued for several weeks, after which this review petition was eventually accepted. I wrote an elaborate verdict regarding it which was published in the PLD. However, Justice Aftab Husain maintained his initial stance, which was that *Rajm* is not a *Hadd* but a *Ta'zeer*. However, since the law of *Rajm* could not be declared to be contrary to the Quran and Sunnah on the basis of his individual opinion, the original verdict of the Federal Shariat Court was agreed to be rescinded and the law of *Rajm* was maintained.

This court environment was a new experience for me. Respected Justice Pir Karam Shah and respected Justice Malik Ghulam Ali (may Allah's mercy be upon them both) had been appointed as judges under the quota of scholars together with me, and we would regularly consult each other regarding Shariah-related matters. Hadhrat Justice Pir Karam Shah (may Allah's mercy be upon him) followed the Bareilvi school of thought, but was a very erudite, moderate and balanced elder. His writing and speech were very elegant and eloquent. Tafsir Zia-ul-Quran bears witness to his ideological moderation. He would treat me very kindly, and his valuable and harmonious cooperation in national matters was a source of much strength for me. Later, I worked with him in the Supreme Court as well for years upon years and continued to be honoured with his company. During this entire time, we did not have even a sliver of any unpleasantness whatsoever.

The second elder was respected Justice Malik Ghulam Ali, who had been the special aide of Maulana Sayyid Abul A'la Mawdudi. With respect to the book "*Khilafat o Mulukiat*", our correspondence argument was famous, which I have described previously. I had not known him

in person before the appointment to the Court, and our very first meeting took place in court when we were sworn in. However, Alhamdulillah that debate had no effect on our relationship of well-wishing and mutual consultation, rather he did not even ever mention that argument. Thus, overall I had good companionship with him as well. The tradition in higher courts is that when more than one judge is sworn in at the same time, their seniority is based on their age. To this end, Justice Malik Ghulam Ali was declared the most senior of us as he was older than both of us. After him was Justice Pir Muhammad Karam Shah, while I was the junior-most of the three as I was the youngest. Respected Justice Aftab would often express his intellectual conformance with respected Malik Ghulam Ali by including him in the Bench together with himself.

This lowly one gradually developed closer ties of fellowship with the judges coming from High Courts as well, with quite frank relationships especially with Justice Kareemullah Durrani, Justice Zahoorul Haq and Justice Chaudhary Siddiq (may Allah's mercy be upon them). And may Allah recompense them the best of rewards, for they always treated this lowly one with great love and respect, and mostly concurred with us in Shariah-related matters. The late Justice Kareemullah Durrani passed away soon. MashaAllah Justice Zahoorul Haq was a man of very sound thinking and had been brought up in a religious environment. We received all kinds of support from him. Respected Chaudhary Siddiq would fast every day. During tea breaks, he would be seen writing something on a piece of paper. I once asked him as to what he wrote. He replied that he was a disciple of a Shaykh who had instructed him to write *Salawaat* a certain number of times every day. He would thus write *Salawaat* during tea breaks. Now I do not know about his whereabouts.

The Chief Justice of the Court was respected Aftab Husain. May Allah Most High forgive him. He also possessed many good qualities. He was regular in prayer and fasting and would remain in a state of ablution at all times. Despite not knowing Arabic language, he would diligently research books of Tafsir, Hadith and Fiqh with the help of the extremely competent Research Officer of the Court, Maulana Anwaarullah (may Allah preserve him). He lived alone in Islamabad and would be engrossed in reading and Court duties day and night. Prior to our appointment to the Federal Shariat Court, he was the one who wrote most of the verdicts for cases in which some law had been challenged as being contrary to the Shariah, because nobody else could match him in

research. However, not only that he did not get along well with scholars, he would often harbour suspicions about them. Consequently, he would often form his own “Mujtahid”-like opinions on the basis of his aforementioned research. Furthermore, he was of the mindset that contemporary English laws did not have any significant flaws. Therefore, whenever a petition challenging a contemporary law as being contrary to the Quran and Sunnah would be filed, he would be inclined to reject it. Once, a petition challenging the law of *Shirkat* (Partnership) was filed. After a cursory hearing, he rejected it saying that it was related to “Fiscal Laws” which are out of the scope of the Federal Shariat Court. Justice Zahoorul Haq and I strongly disagreed with his opinion that this law was not in the scope of the Federal Shariat Court. However, when the late Justice Aftab looked towards other members of the Bench with respect to his opinion of rejecting this petition, nobody else expressed their disagreement except Justice Zahoorul Haq and I, so he rejected the petition. Since I disagreed with this decision, when it came to me for my signature, I decided to write a separate verdict from my side. With respect to the fiscal laws declared to be out of the scope of the Federal Shariat Court, I did not believe they included every law that had anything to do with money, rather the term “Fiscal Law” in English had been used for it. The reason why these laws had been declared out of scope for the Federal Shariat Court was that the government wanted to maintain the banking and tax-related laws for three years, so that interest-free banking could be implemented in the meantime. I thus had to interpret and explain this term in my verdict, which could be better done in English. I thus wrote a verdict in English for the first time and also showed it to respected Justice Zahoorul Haq. In the verdict he wrote, he overall agreed to my verdict. All three verdicts have been published in the PLD.